

ENDING THE DEATH PENALTY FOR PEOPLE WITH SEVERE MENTAL ILLNESS

(HOW RECENT SUPREME COURT CASES INTERPRETING *ATKINS V. VIRGINIA* SUPPORT A NEW DEATH PENALTY PROHIBITION)

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I. INTRODUCTION

People with severe mental illness¹ continue to be executed in the United States.² Though there are constitutional prohibitions against executing “insane” defendants,³ many people with severe mental illness are not considered to be “insane” and are still executed.⁴ Defendants with severe mental illness facing the death penalty often argue that the impairment from their illness should make them constitutionally ineligible for execution.⁵ These defendants argue that their impairment is sufficiently similar to people with

¹ Some sources prefer to use the term “severe mental disorder or disability.” I mean the term “severe mental illness” to cover the same conditions as in American Bar Association Recommendation Number 122A, adopted by the House of Delegates on August 7–8, 2006. https://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/mental_illness_policies.authcheckdam.pdf (2006) at 6–7 [hereinafter ABA Recommendation 122A] (describing the conditions that would qualify as severe mental disorder or disability, including “Axis I diagnoses” such as “schizophrenia and other psychotic disorders, mania, major depressive disorder, and dissociative disorders” and other conditions that cause significant disfunction).

² *Mentally Ill Prisoners Who Were Executed*, DEATH PENALTY INFORMATION CENTER (last visited Sept. 4, 2019), <https://deathpenaltyinfo.org/policy-issues/mental-illness/mentally-ill-prisoners-who-were-executed> (listing recent executions of inmates who had mental illness).

³ See *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (“The Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane.”).

⁴ See Frank R. Baumgartner and Betsy Neill, *Does the death penalty target people who are mentally ill? We checked.*, THE WASHINGTON POST (Apr. 3, 2017) [https://www.washingtonpost.com/news/monkey-cage/wp/2017/04/03/does-the-death-penalty-target-people-who-are-mentally-ill-we-checked/?hpid=hp_hp-top-table-main-monkey-cage%3Apenalty%3Ahomepage%2Ft%3Aba1a7bb202d8](https://www.washingtonpost.com/news/monkey-cage/wp/2017/04/03/does-the-death-penalty-target-people-who-are-mentally-ill-we-checked/?hpid=hp_hp-top-table-main-monkey-cage%3Apenalty%3Ahomepage%2Ft%3Aba1a7bb202d8&hpid=hp_hp-top-table-main-monkey-cage%3Apenalty%3Ahomepage%2Ft%3Aba1a7bb202d8) (reporting that people with severe mental illness are executed despite their disability).

⁵ See, e.g., *Smith v. Davis*, 927 F.3d 313, 339 (5th Cir. 2019) (“Smith asks us to affirm the district court’s grant of habeas relief on the basis that evolving standards of decency render those with ‘severe mental illness’ ineligible for the death penalty under the Eighth Amendment.”). See also *State v. Kleypas*, 382 P.3d 373, 445–46 (Kan. 2016) (surveying cases that have addressed the issue of whether mental impairment ought to constitutionally bar the death penalty in appeals by death row defendants).

intellectual disability,⁶ whom the Supreme Court held to be constitutionally ineligible for the death penalty in *Atkins v. Virginia*.⁷ Legal commentators and legal and medical professional organizations have also argued for a new prohibition against executing people who were significantly impaired by severe mental illness at the time of their crime.⁸ However, no court has accepted this argument.⁹

This article argues that courts or legislatures should prohibit the execution of people with severe mental illness who were significantly impaired by their illness at the time of their crime in light of recent Supreme Court death penalty interpretation of *Atkins*. Defendants who were significantly impaired by severe mental illness at the time of their crime should not be eligible for the death penalty because they have sufficiently reduced culpability.¹⁰ This reduced culpability, as for defendants with intellectual disability in *Atkins* and juveniles in *Roper v. Simmons*,¹¹ cannot be adequately accounted for in sentencing.¹² A new prohibition should therefore be created and operate as a dispositive mitigating factor against imposing the death penalty.

⁶ See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) [hereinafter *Atkins*] (concluding that “death is not a suitable punishment for a mentally retarded criminal.”). The *Atkins* court used the term “mentally retarded” but the currently-accepted term referring to the same condition is “intellectual disability,” which I will use throughout this comment. See, e.g., *Hall v. Florida*, 572 U.S. 701, 704 (2014) (noting the change in accepted terminology from “mental retardation” to “intellectual disability” as describing identical phenomena, which is reflected in the Diagnostic and Statistical Manual of Mental Disorder (DSM-5)). Major diagnostic systems in the United States define intellectual disability as a developmental condition that is characterized by significant deficits in both intellectual functioning and adaptive behavior, including conceptual, social and practical skills. Marc J. Tassé, *Defining intellectual disability: Finally we all agree...almost*, AMERICAN PSYCHOLOGICAL ASSOCIATION (Sept. 2016), <https://www.apa.org/pi/disability/resources/publications/newsletter/2016/09/intellectual-disability>.

⁷ *Atkins*, 536 U.S. at 320–21 (holding that executing people with intellectual disability violates the Eighth Amendment prohibition on cruel and unusual punishment).

⁸ See, e.g., Christopher Slobogin, *What Atkins Could Mean For People With Mental Illness*, 33 N.M. L. REV. 293 (2003) (advocating for extending *Atkins* to people with mental illness). See also ABA Recommendation 122A, at 5 (recommending a prohibition on executing “persons with severe mental disabilities whose demonstrated impairments of mental and emotional functioning at the time of the offense would render a death sentence disproportionate to their culpability.”).

⁹ *Kleypas*, 382 P.3d at 445–46. See also Part V *infra* (listing cases that have considered and rejected this contention when raised by a death row defendant).

¹⁰ See Part II(B) *infra* (arguing that people with severe mental illness who were significantly impaired at the time of their crime have sufficiently reduced culpability to be eligible for a death penalty exemption).

¹¹ *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that defendants who were juveniles at the time of their crime had sufficiently reduced culpability to be ineligible for the death penalty under the Eighth Amendment).

¹² See Part VII(A) *infra* (arguing that impairment due to severe mental illness cannot be adequately accounted for in sentencing).

A new prohibition of this kind faces two significant hurdles that can be overcome by sensible qualifications informed by Supreme Court decisions interpreting *Atkins*. The first hurdle is determining which defendants have “severe mental illness.”¹³ This article argues that an appropriate solution would be to rely on the standards of medical professionals to determine which defendants have “severe mental illness.” This solution would align with the Supreme Court’s approach in recent cases interpreting *Atkins*. Recent Supreme Court cases interpreting *Atkins* have relied extensively on the standards of medical professionals to determine which defendants have intellectual disability for the purpose of exempting them from the death penalty.¹⁴ A similar reliance on medical professionals for defining “severe mental illness” would be appropriate in light of these cases.

The second hurdle for a new prohibition is to account for variations in impairment from severe mental illness that varies the level of reduced culpability for people with severe mental illness. The variation in impairment among and within mental illnesses necessitates a more individuated approach than for people with intellectual disability and juveniles.¹⁵ Severe mental illness is not often as pervasively disabling as intellectual disability or youth. People with severe mental illness do not all have reduced culpability and those that do are often not disabled all of the time. A prohibition on executing people with severe mental illness must account for this distinction by individuating the approach. This can be accomplished by requiring that the defendant’s severe mental illness caused significant impairment at the time of the crime that sufficiently reduced his or her culpability.¹⁶ The requirement would also resolve many of the objections to category-defining problems, as discussed further below. The significant impairment requirement, along with a definition of “severe mental illness” informed by medical professionals, offers a sensible and workable expansion of death penalty protections. This article works to justify this approach and examine the current state of the law on the issue.

II. IMPAIRMENTS FROM SEVERE MENTAL ILLNESS CAN SUFFICIENTLY

¹³ See, e.g., *People v. Mendoza*, 62 Cal.4th 856, 911 (Cal. 2016) (rejecting defendant’s proposed exemption from the death penalty due to his mental illness in part because the “defendant [did] not offer a definition of what level of mental illness would constitute serious mental illness.”).

¹⁴ See, e.g., *Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017).

¹⁵ See ABA Recommendation 122A, at 7 (explaining that, for people with severe mental illness, “preclusion of a death sentence based on diagnosis alone would not be sensible, because the symptoms of these disorders are much more variable than those associated with retardation or other disabilities covered by the Recommendation’s first paragraph.”).

¹⁶ See *id.* at 7–9 (explaining how a significant impairment requirement might work).

REDUCE CULPABILITY TO QUALIFY FOR A DEATH PENALTY EXEMPTION

The Supreme Court in *Atkins* found that as groups people with intellectual disability have sufficiently reduced culpability to be categorically ineligible for the death penalty. The Court focused on cognitive, judgmental, and social impairments of people in these groups to make this determination. People with severe mental illness, as defined below, have similar impairments that sufficiently reduce their culpability as a group that should make them ineligible for the death penalty.

A. The Reduced Culpability of People With Intellectual Disability

The Supreme Court explained in *Atkins* the relevant impairments of people with intellectual disability that reduce their culpability.¹⁷ The Court found that people with intellectual disability are not often so impaired to be incompetent to stand trial because they “frequently know the difference between right and wrong.”¹⁸ However, because of “their disabilities in areas of reasoning, judgment, and control of their impulses . . . they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.”¹⁹ By definition, people with intellectual disability “have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”²⁰ These impairments are relevant not only because they reduce culpability, but because these impairments “can jeopardize the reliability and fairness of capital proceedings” against defendants with intellectual disability.²¹ The Court noted that people with intellectual disability “may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.”²² Due to these impairments, the Supreme Court found that executing people with intellectual disability violates the Eighth Amendment prohibition against cruel and unusual punishment.²³

¹⁷ *Atkins*, 536 U.S. at 320.

¹⁸ *Id.* at 318.

¹⁹ *Id.* at 306.

²⁰ *Id.* at 318.

²¹ *Id.* at 306–07.

²² *Id.* at 320–21.

²³ *Id.* at 321.

B. Severe Mental Illnesses Can Similarly Reduce Culpability

People with significant impairment from severe mental illness at the time of their crime have sufficiently reduced culpability based on the factors identified by the Supreme Court in *Atkins*. The definition of “severe mental illness” in American Bar Association Recommendation 122A presents a good functional definition based on agreements by medical and legal professionals.²⁴ The Recommendation was created by a task force of legal and mental health professionals and was officially endorsed by the American Psychological Association and American Psychiatric Association among others.²⁵ Recommendation 122A defines severe as signifying “a disorder that is roughly equivalent to disorders that mental health professionals would consider the most serious ‘Axis I diagnoses.’ These disorders include schizophrenia and other psychotic disorders, mania, major depressive disorder, and dissociative disorders – with schizophrenia being by far the most common disorder seen in capital defendants.”²⁶ The Recommendation task force explicitly excluded Antisocial Personality Disorder and the voluntary use of drugs or alcohol from eligibility for the exemption because these conditions do not lessen culpability or deterrability.²⁷ The Recommendation also explains that “[s]ome conditions that are not considered an Axis I condition might also, on rare occasions, become ‘severe’ as that word is used in this Recommendation.”²⁸

These conditions sufficiently reduce culpability. The Recommendation explains that “In their acute state, all of these disorders are typically associated with delusions (fixed, clearly false beliefs), hallucinations (clearly erroneous perceptions of reality), extremely disorganized thinking, or very significant disruption of consciousness, memory and perception of the environment.”²⁹ These impairments negatively impact the ability of people with severe mental illness in “reasoning, judgment, and control of their impulses,” which the Supreme Court found to reduce culpability in *Atkins*.³⁰ Considering the serious impairments caused by severe mental illness, people with significant impairment from severe mental illness should be considered to have

²⁴ ABA Recommendation 122A (2006), at 6–7.

²⁵ *Id.* at 3.

²⁶ *Id.* at 6.

²⁷ *Id.* at 9.

²⁸ *Id.* at 6–7 (“For instance, some persons whose predominant diagnosis is a personality disorder, which is an Axis II disorder, may at times experience more significant dysfunction. Thus, people with borderline personality disorder can experience ‘psychotic-like symptoms . . . during times of stress.’ However, only if these more serious symptoms occur at the time of the capital offense would the predicate for this Recommendation’s exemption be present.”).

²⁹ *Id.* at 6.

³⁰ *Atkins*, 536 U.S. 304 at 306.

sufficiently reduced culpability to be considered for a categorical death penalty exemption.

III. DEFERENCE TO THE DEFINITIONS OF MEDICAL PROFESSIONAL ORGANIZATIONS WOULD RESOLVE BASIC CATEGORY PROBLEMS OF A NEW PROHIBITION

Some courts have refused to create a new death penalty exemption in part because of concerns about defining a category of mental illness that would be “severe” or “serious” enough to account for sufficiently reduce culpability.³¹ A simple solution would be to rely on the standards of medical professionals to define “severe mental illness” as in ABA Recommendation 122A.³² This approach would also be consistent with the approach of the Supreme Court in recent decisions interpreting *Atkins*. In *Hall v. Florida*³³ and *Moore v. Texas*,³⁴ the Court required states to conform to the clinical definitions of intellectual disability in applying *Atkins*.³⁵ Along with the proposed significant impairment requirement that necessitates an individuated analysis,³⁶ deferring to medical professionals’ definition of “severe mental illness” would resolve basic category problems of a new death penalty exemption.

A. Supreme Court Deference to the Definitions of Medical Professionals in *Hall* and *Moore*

In *Hall*, the Supreme Court required states to conform to “clinical definitions” when determining whether a defendant has intellectual disability for the purpose of *Atkins*.³⁷ The *Hall* Court noted that the *Atkins* majority relied on clinical definitions from then-current Diagnostic and Statistical Manual of Mental Disorders, 4th Edition (DSM-IV) to make its decision.³⁸

³¹ See, e.g., *People v. Mendoza*, 62 Cal.4th 856, 911 (Cal. 2016) (rejecting defendant’s proposed exemption from the death penalty due to his mental illness in part because the “defendant [did] not offer a definition of what level of mental illness would constitute serious mental illness.”).

³² See Part II.B *supra* (explaining the definition of “severe mental illness”).

³³ 572 U.S. 701 (2014).

³⁴ 137 S. Ct. 1039 (2017).

³⁵ See Michelle Armstrong, Note, *Addressing Defendants Who Are “Crazy, But Not Crazy Enough”: How Hall v. Florida Changes the Death Penalty For Mentally Ill Defendants*, 47 U. TOL. L. REV. 743, 753 (2016) (explaining reliance on medical expertise in *Hall*); *Moore*, 137 S. Ct. at 1053 (reasoning that “[t]he medical community’s current [intellectual disability] standards supply one constraint on States’ lee-way” to impose the death penalty).

³⁶ See ABA Recommendation 122A, 7–9 (explaining the proposed significant impairment requirement).

³⁷ *Hall*, 572 U.S. at 719–20. See also, Armstrong, *supra* note 35, at 753 (explaining reliance on medical experts in *Hall*).

³⁸ *Hall*, 572 U.S. at 719 (citing *Atkins*, 536 U.S. at 308 n.3).

The *Hall* Court followed this method by relying on the “views of medical experts” and noting that “this Court and the States have placed substantial reliance on the expertise of the medical profession” in determining the category of people to whom *Atkins* would apply.³⁹ The Court then required that the legal determination of intellectual disability be “informed by the medical community’s diagnostic framework.”⁴⁰

Three years later in *Moore*, the Supreme Court further required states to conform to the standards of medical professionals. The Court found that the “medical community’s current standards supply one constraint on States’ leeway” to implement the holding of *Atkins*.⁴¹ The Court cited clinical definitions in the most-recent edition of the Diagnostic and Statistical Manual of Mental Disorders, DSM-5, as reflective of current medical community standards.⁴² The Supreme Court has thus required states to rely heavily on medical professionals in determining which defendants have intellectual disability for the purpose of applying *Atkins*.

B. Adopting Medical Professionals’ Definition of “Severe Mental Illness” Would Resolve Basic Category Problems

Relying on medical professionals’ definition of “severe mental illness,” similarly to reliance on the clinical definition of “intellectual disability” in *Atkins* cases, would resolve basic category problems of a new categorical prohibition. ABA Recommendation 122A’s definition of “severe mental illness” represents the position of relevant medical professional organizations on the category of mental illnesses that would qualify as “severe” enough to sufficiently reduce culpability. The Recommendation was officially endorsed by the American Psychological Association and the American Psychiatric Association.⁴³ It defines “severe” as signifying “a disorder that is roughly equivalent to disorders that mental health professionals would consider the most serious ‘Axis I diagnoses.’ These disorders include schizophrenia and other psychotic disorders, mania, major depressive disorder, and dissociative disorders – with schizophrenia being by far the most common disorder seen in capital defendants.”⁴⁴ The Recommendation also explains that “[s]ome

³⁹ *Id.* at 721–22.

⁴⁰ *Id.*

⁴¹ *Moore v. Texas*, 137 S. Ct. 1039, 1053 (2017). The Supreme Court recently revisited *Moore* and once again reversed the decision of the Court of Criminal Appeals of Texas. *See Moore v. Texas*, 139 S.Ct. 666 (2019) (per curiam) (“We conclude that the appeals court’s opinion, when taken as a whole and when read in the light both of our prior opinion and the trial court record, rests upon analysis too much of which too closely resembles what we previously found improper.”).

⁴² *Moore*, 137 S. Ct. at 1053.

⁴³ ABA Recommendation 122, at 3.

⁴⁴ *Id.*

conditions that are not considered an Axis I condition might also, on rare occasions, become ‘severe’ as that word is used in this Recommendation.”⁴⁵ Courts should rely on this definition of “severe mental illness” and medical professionals’ definitions of specific conditions to define the category for whom a new prohibition would apply.

A new prohibition should also require an individuated determination that the severe mental illness caused the defendant significant impairment at the time of the crime. ABA Recommendation 122A includes this component.⁴⁶ This requirement is necessary because of the heterogeneity of symptoms among and within different mental illnesses.⁴⁷ The Recommendation proposes three kinds that would qualify: if the defendant “had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of law.”⁴⁸ This is a reasonable and workable standard that is similar to many state insanity defenses.⁴⁹ It is similar, but it is not already encompassed in the insanity defense because the insanity defense requires a stricter standard of complete lack of knowledge of what the person was doing or that it was wrong.⁵⁰ Courts should include the significant impairment standard or something similar for a new categorical prohibition. This significant impairment requirement along with the “severe mental illness” requirement would resolve basic category problems in identifying people with reduced culpability. Resolving basic category problems would go a long way for creating a new categorical death penalty exemption for people with severe mental illness. The next sections examine current opinion on the issue and how a new prohibition may be created.

⁴⁵ *Id.* at 6–7 (explaining that certain Axis II disorders may “at times experience more significant dysfunction[]” like personality disorder).

⁴⁶ *Id.* at 7–9. *See id.* at 7 (stating that the preclusion of a particular sentence based on diagnosis alone is not sensible because the disorders may greatly vary).

⁴⁷ *See id.* at 7 (“[F]or the disorders covered by the second part of this Recommendation, preclusion of a death sentence based on diagnosis alone would not be sensible, because the symptoms of these disorders are much more variable than those associated with retardation or other disabilities covered by the Recommendation’s first paragraph.”).

⁴⁸ *Id.* at 1.

⁴⁹ *See, e.g.*, 18 PA. CONS. STAT. § 315(b) (2014)

“For purposes of this section, the phrase ‘legally insane’ means that, at the time of the commission of the offense, the actor was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if the actor did know the quality of the act, that he did not know that what he was doing was wrong.”

⁵⁰ *See id.* (requiring complete lack of knowledge of the “nature and quality of the act” or that one “did not know that what he was doing was wrong” to qualify for the insanity defense).

IV. CURRENT OPINION ON THE ISSUE

At this time, courts are unlikely to create a new prohibition on executing people with severe mental illness because there is not enough evidence of a national consensus against the practice.⁵¹ This could change, however, if more legislatures adopt the proposal of a prohibition on executing people who were significantly impaired at the time of their crime from severe mental illness. The Supreme Court in *Atkins* and *Roper* focused heavily on legislation and legislative trends in finding a national consensus existed for prohibiting the death penalty for people with intellectual disability and juveniles.⁵² On the issue of an exemption for people with severe mental illness, only one state, Connecticut, has ever passed legislation creating such an exemption.⁵³ This heavily weighted factor alone likely dooms any finding of a national consensus.⁵⁴ Other relevant factors generally support an exemption but are not as heavily weighted as the legislative trend.⁵⁵ Based on these factors, every court that has considered the issue has found that no national consensus against the practice exists.⁵⁶ Lack of national consensus makes it extremely unlikely, but not impossible, that a new judicially created exemption will be created for people with severe mental illness until supporting legislation is passed.⁵⁷ This section examines current and historical legislation on the issue as well as academic, popular, international, and medical and legal professional opinion on the issue.

⁵¹ See, e.g., *State v. Kleypas*, 382 P.3d 373, 445–46 (Kan. 2016) (listing cases that have declined “to extend the *Atkins* and *Roper* rationale to the mentally ill” and concluding there is a “lack of legislative direction”).

⁵² *Atkins*, 536 U.S. at 312 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (“[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”) (internal quotations omitted)). See also *Roper v. Simmons*, 543 U.S. 551, 564–67 (2005) (comparing state legislation in order to determine whether there is a national consensus); *Atkins*, 536 U.S. at 315 (“It is not so much the number of these States that is significant, but the consistency of the direction of change.”) (footnote omitted)).

⁵³ *Kleypas*, 382 P.3d at 445. See also CONN. GEN. STAT. § 53a-46a(h) (2009) (abolishing the death penalty for persons with intellectual disabilities or persons whose mental capacity was significantly impaired). Connecticut subsequently abolished the death penalty completely in 2012. See *Kleypas*, 382 P.3d at 445.

⁵⁴ See cases cited *supra* note 52 (“[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”) (internal quotations omitted).

⁵⁵ See *infra* Part IV.B.

⁵⁶ See Part V *infra*.

⁵⁷ Courts also conduct an independent analysis of the issue in addition to considering whether a national consensus exists. See, e.g., *Roper*, 543 U.S. at 564 (“We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles.”).

A. Legislation on the Issue

In creating exemptions from the death penalty, the Supreme Court has focused extensively on legislative opinion on an issue.⁵⁸ The *Atkins* Court relied heavily on “objective” factors, particularly state legislation, in prohibiting the execution of people with intellectual disability.⁵⁹ The Court noted that eighteen states and the federal government had laws prohibiting the execution of people with intellectual disability and similar laws had passed at least one house in a minimum of three other states.⁶⁰ The Court emphasized that in considering the persuasive force of legislation it “is not so much the number of these States that is significant, but the consistency of the direction of change.”⁶¹ The Court concluded that this factor and others “unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders[.]”⁶² The majority also relied on the opinions medical professional organizations, religious groups in the United States, foreign law, and polling data.⁶³ Three years later, a similar majority⁶⁴ in *Roper* relied on similar data to prohibit the execution of juveniles.⁶⁵

⁵⁸ See cases cited *supra* note 52 (“[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”) (internal quotations omitted).

⁵⁹ *Atkins*, 536 U.S. at 312–17 (analyzing state legislation prohibiting the execution of people with intellectual disability).

⁶⁰ *Id.* at 313–16. See also *id.* at 313–15 (noting that U.S. Congress, Georgia, Maryland, Kentucky, Tennessee, New Mexico, Arkansas, Colorado, Washington, Indiana, Kansas, New York, Nebraska, South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina have prohibited the execution of persons with intellectual disabilities and similar bills have passed at least in one house of other States).

⁶¹ *Id.* at 315 (footnote omitted). This statement was likely in response to strong criticism by the dissenting Justices who argued that eighteen states - less than half of states that employ the death penalty at the time - do not constitute a national consensus. *Id.* at 342–44 (Scalia, J. dissenting).

⁶² *Id.* at 317.

⁶³ *Id.* at 316–17 n.21. The dissenting Justices, however, sharply criticized the use of these facts as evidence of national consensus. *Id.* at 347–48 (Scalia, J. dissenting).

⁶⁴ The majority in *Atkins* included Justices Stevens, O’Connor, Kennedy, Souter, Ginsburg, and Breyer. Dissenters included Justices Rehnquist, Scalia, and Thomas. See *Atkins*, 536 U.S. at 321. The majority in *Roper* included Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer. Dissenters included Justices Rehnquist, O’Connor, Scalia, and Thomas. See, *Roper v. Simmons*, 543 U.S. 551, 587, 607 (2005). Justice O’Connor was the only justice to change position, from the majority in *Atkins* to the dissent in *Roper*.

⁶⁵ See *Roper*, 543 U.S. at 564.

“The evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded By a similar calculation in this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach.”

There is unfortunately no similar legislative trend toward prohibiting the death penalty for people with severe mental illness.⁶⁶ Only one state, Connecticut, has ever passed such legislation.⁶⁷ The 2009 Connecticut legislation prohibited the execution of defendants if “the defendant’s mental capacity was significantly impaired or the defendant’s ability to conform the defendant’s conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution.”⁶⁸ This model conforms with the proposal above of a “severe mental illness” and “significant impairment” requirement. This law is not still on the books, however, because Connecticut subsequently abolished the death penalty in 2012.⁶⁹

Other state legislatures in Kentucky, North Carolina, Indiana, and Tennessee have considered similar legislation but none of have passed it.⁷⁰ The Kentucky and North Carolina legislatures have both considered legislation with wording directly from ABA Recommendation 122A.⁷¹ Indiana considered proposed legislation in 2009 to ban the execution of individuals with ‘severe mental illness,’ defined as a diagnosis of schizophrenia, schizoaffective disorder, bipolar disorder, major depression, or delusional disorder.⁷² A bill has also been recently proposed in South Carolina with language similar to ABA Recommendation 122A.⁷³ Considering that there is

⁶⁶ See *State v. Kleypas*, 382 P.3d 373, 445 (Kan. 2016) (finding no legislative trend towards extending *Atkins* and *Roper* to persons with a mental illness).

⁶⁷ *Id.*

⁶⁸ *Id.*; CONN. GEN. STAT. § 53a-46a(h)(2) (2009).

⁶⁹ *Kleypas*, 382 P.3d at 445.

⁷⁰ *Id.* (“*Kleypas* cites relatively recent bills introduced in the legislatures of Kentucky, North Carolina, Indiana, and Tennessee However, none of these states actually passed legislation and all of them still retain the death penalty.”).

⁷¹ See AMERICAN BAR ASSOCIATION, *Resources on Severe Mental Illness and Death Penalty*, (Nov. 29, 2018), https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/serious-mental-illness-initiative-/resources0/ (listing proposed legislation prohibiting the death penalty for people with severe or serious mental illness).

⁷² *Id.*

⁷³ Elle Klein, *Flying over the Cuckoo’s Nest: How the Mentally Ill Landed into an Unconstitutional Punishment in South Carolina*, 68 S.C. L. REV. 571, 595 (2017)

Bill 3535, currently residing in the House Judiciary Committee, was proposed to the South Carolina legislature in February 2015. This bill would ban the execution of an offender that had a severe mental disability at the time of the commission of the crime. The bill defines severe mental disability as “a *severe mental illness* that significantly impairs a person’s capacity to do any of the following: (i) appreciate the nature, consequences, or wrongfulness of the person’s conduct; (ii) exercise rational judgment in relation to conduct; or (iii) conform the person’s conduct to the requirements of the law . . .” or as “dementia or traumatic brain injury

no current legislation prohibiting the execution of people significantly impaired by severe mental illness at the time of their crime and only one state has ever done so, there is no legislative trend against these executions.

B. Academic, Popular, International, and Medical Professional Opinion

Academic, popular, international, and medical professional opinion can also be evidence that a national consensus exists⁷⁴ but offer mixed results on a death penalty exemption for people with severe mental illness. These factors do not universally support the position and are not as heavily weighted as legislative trend.⁷⁵

Academic opinion presents mixed reviews of a new death penalty prohibition. The possibility of a new death penalty exemption for people with severe mental illness was considered by legal commentators soon after the 2002 *Atkins* decision, including articles in 2003 by Christopher Slobogin and Dr. Douglas Mossman.⁷⁶ Slobogin argued that allowing the executions of people with severe mental illness while at the same time prohibiting the execution of people with intellectual disability violates the Equal Protection Clause.⁷⁷ Slobogin presented an interesting argument but it has not gained any traction.⁷⁸ Dr. Mossman, a psychiatrist, advocated for a different approach. He argued that *Atkins* was wrongly decided and should not be extended to people with severe mental illness.⁷⁹ Mossman argued that *Atkins* mistakenly treats people with intellectual disability as a discrete group, improperly requires relying on diagnoses to make legal decisions, and unwisely requires considering extending the prohibition to other psychiatric disabilities.⁸⁰ It may also negatively affect discrimination against people with intellectual disability.⁸¹ Subsequent articles by other commentators have been mostly supportive of

that results in significantly sub-average general intellectual functioning, existing concurrently with significant limitations in adaptive functioning" (citations omitted).

⁷⁴ See *Atkins*, 536 U.S. at 316–17 n.21 (2002) (finding academic, popular, international, and medical professional opinion relevant to whether a national consensus existed against the execution of people with intellectual disability).

⁷⁵ See cases cited *supra* note 52 ("the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures").

⁷⁶ See generally Slobogin, *supra* note 8; Douglas Mossman, *Atkins v. Virginia: A Psychiatric Can of Worms*, 33 N.M. L. REV. 255 (2003).

⁷⁷ Slobogin, *supra* note 8.

⁷⁸ See discussion in Part V *infra* (showing that no courts have accepted that executing defendants with severe mental illness violates the Equal Protection clause).

⁷⁹ Mossman, *supra* note 76, at 256.

⁸⁰ *Id.*

⁸¹ *Id.* at 272–73. This article answers these objections in the discussion of Part VI, *infra*.

prohibiting the execution of people with severe mental illness.⁸² More consensus would have to be reached in order to consider this factor to weigh heavily in favor of a new death penalty prohibition.

On public opinion, few polls have been conducted on the issue but the few seem to support prohibiting the execution of people with severe mental illness. A 2014 Public Policy Polling national survey of 943 registered voters found that 58 percent opposed death penalty eligibility for people with mental illness, 28 percent supported eligibility, and 14 percent were not sure.⁸³ According to the poll, the divide was not along political lines as Republicans, Democrats, and Independents all opposed death penalty eligibility for people with mental illness.⁸⁴ Similarly, a 2015 multi-state voter survey found that 66 percent of voters supported a death penalty exemption for mental illness again across the political spectrum.⁸⁵ Many more comprehensive studies would have to be done to draw significant conclusions on public opinion of the issue. For example, the *Atkins* court considered more than thirty public opinion polls when deciding that case.⁸⁶

On international opinion, many international organizations oppose the execution of people with severe mental illness, but the relevance of

⁸² See, e.g., Aurélie Tabuteau Mangels, *Should Individuals with Severe Mental Illness Continue to Be Eligible for the Death Penalty*, 32 CRIM. JUST. 9, 11–13 (2017) (supporting a categorical prohibition on execution of people with severe mental illness); Lyn Entzeroth, *The Challenge And Dilemma Of Charting A Course To Constitutionally Protect The Severely Mentally Ill Capital Defendant From The Death Penalty*, 44 AKRON L. REV. 529, 561 (2011) (supporting a severe mental illness exemption and analyzing the “tough road ahead” for its possibility); Pamela A. Wilkins, *Rethinking Categorical Prohibitions on Capital Punishment: How the Current Test Fails Mentally Ill Offenders and What to Do About It*, 40 U. MEM. L. REV. 423, 470–71 (supporting a categorical prohibition on execution of people with severe mental illness); William W. Berry III, *Evolved Standards, Evolving Justices? The Case For A Broader Application of the Eighth Amendment*, 96 WASH. U. L. REV. 106, 131 (2018) (supporting an expansion of *Atkins* to prohibit the death penalty for people with severe mental illness). But see Joseph Hess, *The Death Penalty for Mentally Ill Offenders: Atkins, Roper, and Mitigation Factors Militate Against Categorical Exemption*, 90 U. DET. MERCY L. REV. 93, 111 (2012) (arguing against a categorical exemption because no “objective indicia” indicate that executing people with severe mental illness has become unusual and mental illness as a mitigating factor offers enough protection); Mark E. Coon, *Drawing the Line at Atkins and Roper: The Case Against Additional Categorical Exemptions from Capital Punishment for Offenders with Conditions Affecting Brain Function*, 115 W. VA. L. REV. 1221, 1224 (2013) (arguing against extending categorical exemption from capital punishment to “additional classes of offenders”).

⁸³ *Poll: Americans Oppose Executing Mentally Ill By 2-to-1 Margin*, DEATH PENALTY INFORMATION CENTER (Dec. 1, 2014), <https://deathpenaltyinfo.org/news/poll-americans-oppose-death-penalty-for-mentally-ill-by-2-1>.

⁸⁴ *Id.* (listing the percentage of members in each political party that opposes executing the mentally ill: Democrats 62%, Republicans 59%, Independents 51%).

⁸⁵ AMERICAN BAR ASSOCIATION DEATH PENALTY DUE PROCESS REVIEW PROJECT, SEVERE MENTAL ILLNESS AND THE DEATH PENALTY (2016) [hereinafter ABA Report 2016], at 36.

⁸⁶ See *Atkins*, 536 U.S. at 328–36 (Rehnquist, J. dissenting) (listing “Poll and survey results reported in Brief for American Association on Mental Retardation et al.”).

international opinion is greatly contested by judges. Many international organizations have advocated for a prohibition against executing people with severe mental illness.⁸⁷ The *Atkins* majority considered international opinion relevant to whether a consensus exists against the practice.⁸⁸ The *Roper* majority similarly acknowledged “the overwhelming weight of international opinion against the juvenile death penalty” when deciding to prohibit it.⁸⁹ International opposition to executing people with severe mental illness may be similarly overwhelming. The United Nations (U.N.) Commission on Human Rights, the U.N. General Assembly, the European Union, the Council of Europe, and the Inter-American Commission on Human Rights have all advocated for a prohibition against executing people with mental illness.⁹⁰ The European Union, which opposes the death penalty entirely, has called on countries that still maintain the death penalty to prohibit the execution of “persons suffering from any mental illness.”⁹¹ Advocacy by the European Union may have some persuasive force for courts, as the *Atkins* majority cited the European Union position as persuasive evidence in creating a categorical prohibition on the execution of people with intellectual disability.⁹² However, international opinion is not controlling and is generally considered to be only marginally relevant compared to other factors.⁹³ Some judges, particularly conservative judges, do not consider international opinion relevant at all.⁹⁴ The persuasiveness of international opinion is thus questionable at best.

On medical professional opinion: Major medical professional organizations support a new prohibition on executing people with severe mental illness who were significantly impaired at the time of their crime.⁹⁵ The Supreme Court in *Atkins* relied in part on the opinion of medical professional organizations in finding a national consensus existed against executing people with intellectual disability.⁹⁶ The major organizations cited by the Supreme

⁸⁷ See ABA Report 2016, at 35–36 (listing international organizations that have advocated for an exemption from the death penalty for people with mental illness).

⁸⁸ *Atkins*, 536 U.S. at 316–17 n.21.

⁸⁹ *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

⁹⁰ ABA Report 2016, at 35–36.

⁹¹ ABA Report 2016, at 35.

⁹² *Atkins*, 536 U.S. at 316 n. 21.

⁹³ See, e.g., *Runyon v. Virginia*, 228 F.Supp.3d 569, 649 (E.D. Va. 2017) (finding international cases and law to be less instructive than state and federal cases that have addressed the issue).

⁹⁴ The dissenters in *Atkins* and *Roper* considered international opinion totally irrelevant. See *Atkins*, 536 U.S. at 322 (Rehnquist, J., dissenting) (criticizing the majority’s use of “foreign laws”).

⁹⁵ See ABA Recommendation 122A, at 3 (“The American Psychiatric Association and the American Psychological Association have officially endorsed the Task Force’s proposal.”).

⁹⁶ See *Atkins*, 536 U.S. at 316–17 n.21 (citing briefs by the American Psychological Association et al. and the AAMR [American Association on Mental Retardation et al.] as relevant evidence to the existence of a national consensus).

Court currently support a death penalty exemption for people with severe mental illness.⁹⁷ However, some judges have expressed doubts about whether medical professional opinion should be relied on.⁹⁸ Medical professional opinion thus offers mixed results.

In *Atkins*, the majority relied in part on the opinion of medical professional organizations to find that a national consensus existed against executing people with intellectual disability.⁹⁹ In footnote 21 of *Atkins*, the Court found that “Additional evidence makes it clear that this legislative judgment [against the execution of people with intellectual disability] reflects a much broader social and professional consensus.”¹⁰⁰ To demonstrate professional consensus, the Court noted that “several organizations with germane expertise have adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender.”¹⁰¹ As examples of these organizations that have “germane expertise” that adopted this official position, the Court cited two briefs.¹⁰² The first was an *amicus* brief for the American Psychological Association,¹⁰³ the American Psychiatric Association,¹⁰⁴ and the American Academy of Psychiatry and the Law.¹⁰⁵ The second was an *amicus* brief for the American Association on Mental Retardation (now named the

⁹⁷ See ABA recommendation 122A, at 3.

⁹⁸ See, e.g., *United States v. Sampson*, 2015 WL 7962394, at *12 (D. Mass. 2015) (“Recognizing that this court may consider the views of the professional organizations that [the defendant] cites, the court finds that they are not as important indicia of contemporary values as the actions of legislatures.”).

⁹⁹ See *Atkins*, 536 U.S. at 316–17 n.21 (2002) (discussing briefs by the American Psychological Association et al. and the AAMR [American Association on Mental Retardation] et al. as relevant evidence to the existence of a national consensus).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ The American Psychological Association describes itself as “the leading scientific and professional organization representing psychology in the United States, with more than 118,000 researchers, educators, clinicians, consultants and students as its members.” *About Us*, AMERICAN PSYCHOLOGICAL ASSOCIATION (last visited Feb. 25, 2019), <https://www.apa.org/about/index>.

¹⁰⁴ The American Psychiatric Association describes itself as having “more than 38,500 members involved in psychiatric practice, research, and academia representing the diversity of the patients for whom they care. As the leading psychiatric organization in the world, APA now encompasses members practicing in more than 100 countries.” *About APA*, AMERICAN PSYCHIATRIC ASSOCIATION (last visited Feb. 25, 2019), <https://www.psychiatry.org/about-apa>.

¹⁰⁵ *Atkins*, 536 U.S. at 316–17 n.21. See also Brief for American Psychological Association et al. as Amici Curiae Supporting Petitioner, *McCarver v. North Carolina*, 533 U.S. 975 (2001) (No. 00-8727). The American Psychological Academy of Psychiatry and the Law [AAPL] describes itself as “an organization of psychiatrists dedicated to excellence in practice, teaching, and research in forensic psychiatry. Founded in 1969, AAPL currently has over 2,000 members in North America and around the world.” *About the Organization*, AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW (last visited Feb. 25, 2019), <http://www.aapl.org/organization>.

American Association on Intellectual and Developmental Disabilities).¹⁰⁶ The *Atkins* Court thus used the opinion of medical professional organizations as evidence in determining whether a national consensus exists against imposing the death penalty on certain groups.¹⁰⁷

Relevant medical professional organizations have adopted official positions opposing the imposition of the death penalty on defendants with severe mental illness.¹⁰⁸ The American Psychological Association and the American Psychiatric Association have officially endorsed this position.¹⁰⁹ These associations were cited by the Supreme Court in *Atkins* footnote 21 as having “germane expertise” on a death penalty exemption for people with intellectual disability.¹¹⁰ Their opinion should therefore be considered evidence for whether a professional consensus exists against the execution of people with severe mental illness.

The American Psychological Association and the American Psychiatric Association’s endorsement of American Bar Association Recommendation 122A reflects their official position on the issue.¹¹¹ The Recommendation resulted from the assembly of a “Task Force on Mental Disability and the Death Penalty” that met shortly after the decision in *Atkins* between April 2003 and March 2005.¹¹² The Task Force was “composed of 24 lawyers and mental health professionals (both practitioners and academics), and included members of the American Psychiatric Association and the American Psychological Association.”¹¹³ The Recommendation in part recommends the prohibition of the “execution of persons with severe mental disabilities whose

¹⁰⁶ The AAMR is now named the American Association on Intellectual and Developmental Disabilities [AAIDD). See *About Us*, AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES (last visited Feb. 25, 2019), <https://aaiddd.org/about-aaiddd> (noting that the AAIDD is the new name of AAMR). The organization describes itself as having “membership over 5,000 strong in the United States and in 55 countries worldwide, AAIDD is the leader in advocating quality of life and rights for those with intellectual disabilities.” *Id.*

¹⁰⁷ The dissenters in *Atkins*, however, did not agree that the opinion of medical professional organizations was relevant. See *Atkins*, 536 U.S. at 324 (Rehnquist, J. dissenting) (“In my view, these two sources—the work product of legislatures and sentencing jury determinations—ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment.”).

¹⁰⁸ See ABA Report 2016, at 1 (“It has now been 10 years since the American Bar Association (ABA), in conjunction with the American Psychiatric Association, American Psychological Association and National Alliance on Mental Illness (NAMI) adopted a policy opposing the death penalty for individuals with severe mental disorders or disabilities present at the time a crime is committed . . .”).

¹⁰⁹ *Id.*

¹¹⁰ *Atkins*, 536 U.S. at 316–17 n.21.

¹¹¹ ABA Recommendation 122A, at 3 (stating that The American Psychiatric Association and the American Psychological Association have endorsed the Task Force’s proposal).

¹¹² *Id.*

¹¹³ *Id.*

demonstrated impairments of mental and emotional functioning at the time of the offense would render a death sentence disproportionate to their culpability.”¹¹⁴ The relevant medical professional organizations thus support an exemption on the death penalty for people with severe mental illness. Medical professional organizations’ opinion supports the finding of a national consensus on the issue.

V. COURTS THAT HAVE ADDRESSED THE ISSUE

Every court that has considered the issue has found a lack of national consensus and declined to create a categorical death penalty exemption for people with severe mental illness.¹¹⁵ Federal courts that have considered and rejected a new categorical exemption include the 5th Circuit,¹¹⁶ the 6th Circuit,¹¹⁷ the Court of Appeals for the Armed Forces,¹¹⁸ the District of Massachusetts,¹¹⁹ the Northern District of Oklahoma,¹²⁰ and the Eastern District of Virginia.¹²¹ State courts that have similarly considered the issue

¹¹⁴ *Id.* at 5.

¹¹⁵ *See* *State v. Kleypas*, 382 P.3d 373, 445 (Kan. 2016) (listing many cases that have addressed the issue and explaining that the “lack of legislative direction has also led courts who have considered the issue to decline to extend the *Atkins* and *Roper* rationale to the mentally ill.”).

¹¹⁶ *See* *Mays v. Stephens*, 757 F.3d 211, 219 (5th Cir. 2014) (“Mays seeks a COA on the ground that the Eighth Amendment prohibits his execution because he is mentally ill. Fifth Circuit precedent however, forecloses that.”).

¹¹⁷ *See* *Franklin v. Bradshaw*, 695 F.3d 439, 455 (6th Cir. 2012) (declining to extend *Atkins*).

¹¹⁸ *See* *United States v. Akbar*, 74 M.J. 364, 406 (Armed Forces App. 2015) (noting that “courts have uniformly determined that there is no constitutional impediment to imposing a capital sentence where a criminal defendant suffers from a mental illness.”) (footnote omitted).

¹¹⁹ *See* *United States v. Sampson*, 2015 WL 7962394 at *13 (D. Mass. 2015) (“However ‘severe’ mental illness is defined, the defendant has not identified objective indicia sufficient to prove that current standards of decency are incompatible with imposing a death sentence on a person suffering from a severe mental illness.”).

¹²⁰ *See* *Thacker v. Workman*, 2010 WL 3466707 at *24 (N.D. Okla. 2010) (“Neither *Atkins* nor *Roper* established, let alone clearly established, a rule that it would be a constitutional violation to execute persons suffering from a mental disorder such as bipolar disorder.”).

¹²¹ *See* *Runyon v. United States*, 228 F.Supp.3d 569, 649 (E.D. Va. 2017) (“After evaluating the decisions by both federal and state courts that have chosen not to extend *Roper* and *Atkins*, this court finds it inappropriate to extend the holdings or the reasoning in *Atkins* and *Roper* to defendants with severe mental illness, absent Supreme Court authority.”).

include the highest courts of California,¹²² Florida,¹²³ Georgia,¹²⁴ Idaho,¹²⁵ Indiana,¹²⁶ Kansas,¹²⁷ Kentucky,¹²⁸ Missouri,¹²⁹ Ohio,¹³⁰ and Pennsylvania¹³¹ as well as criminal appeals courts in Alabama,¹³² Oklahoma,¹³³ Tennessee,¹³⁴ and Texas.¹³⁵ These cases represent analysis of the issue in more than half of the United States jurisdictions that currently have the death penalty on the books.¹³⁶ Most of these cases contain limited analysis of the issue and simply list other cases that have addressed the issue or lack of Supreme Court support and find that no prohibition has been created.¹³⁷ Though no majority opinion has accepted an argument to extend *Atkins* to people with severe mental

¹²² See *People v. Mendoza*, 62 Cal. 4th 856, 911 (Cal. 2016) (rejecting the defendant's request to extend *Atkins* and *Roper*).

¹²³ See *Simmons v. State*, 105 So.3d 475, 511 (Fla. 2012) (explaining that the Florida Supreme Court has recently and repeatedly rejected claims to bar the death penalty for defendants with severe mental illness).

¹²⁴ See *Lewis v. State*, 620 S.E. 2d 778, 786 (Ga. 2005) ("Lewis also does not cite any authority that establishes a constitutional prohibition on convicting and sentencing to death a defendant who is competent but mentally ill, and we decline to extend the holdings of cases like *Atkins* that he cites as being analogous.").

¹²⁵ See *State v. Dunlap*, 313 P.3d 1, 36 (Idaho 2013) ("We join these courts in holding that a defendant's mental illness does not prevent imposition of a capital sentence.").

¹²⁶ See *Matheney v. State*, 833 N.E.2d 454, 458 (Ind. 2005) ("Matheney has not convinced us that he has a reasonable possibility of establishing that mentally ill persons are on the same footing as mentally retarded persons under the *Atkins* rationale.").

¹²⁷ See *State v. Kleybas*, 382 P.3d 373, 448 (Kan. 2016) (concluding that "the Eighth Amendment does not categorically prohibit the execution of offenders who are severely mentally ill at the time of their crimes.").

¹²⁸ See *Dunlap v. Com.*, 435 S.W.3d 537, 616 (Ky. 2013) ("We are not prepared to hold that mentally ill persons are categorically ineligible for the death penalty.").

¹²⁹ See *State v. Johnson*, 207 S.W.3d 24, 51 (Mo. 2006) (en banc) (refusing to extend *Atkins* to people with mental illness).

¹³⁰ See *State v. Mammone*, 13 N.E.3d 1051, 1089 (Ohio 2014) (finding that "the Eighth Amendment does not bar the execution of the seriously mentally ill . . .").

¹³¹ See *Com. v. Baumhammers*, 599 Pa. 1, 61-63 (Pa. 2008) (refusing to extend *Atkins* to people with mental illness).

¹³² See *Dotch v. State*, 67 So.3d 936, 1006 (Ala. Crim. App. 2010) (refusing to "extend or expand the constitutional prohibitions against the application of the death penalty . . .").

¹³³ See *Malone v. State*, 293 P.3d 198, 216 (Okla. Crim. App. 2013) ("We expressly reject that the *Atkins* rule or rationale applies to the mentally ill.").

¹³⁴ See *Pike v. State*, 2011 WL 1544207, at *67-68 (Tenn. Crim. App. 2011) (declining to extend *Roper* or *Atkins*).

¹³⁵ See *Mays v. State*, 318 S.W.3d 368, 379 (Tex. Crim. 2010) (rejecting an extension of *Atkins* or *Roper*).

¹³⁶ These jurisdictions include the fourteen states listed above as well as the U.S. government and U.S. military. See *State by State*, DEATH PENALTY INFORMATION CENTER (last visited Sept. 11, 2019), <https://deathpenaltyinfo.org/states-and-without-death-penalty> (listing the thirty one jurisdictions in the United States that institute the death penalty).

¹³⁷ See, e.g., *State v. Dunlap*, 313 P.3d 1, 36 (Idaho 2013) (listing the other cases that have considered the issue and concluding that the Supreme Court of Idaho would "join these courts in holding that a defendant's mental illness does not prevent imposition of a capital sentence.").

illness, some judges have accepted it in concurring or dissenting opinions.¹³⁸ This of course has little to no weight as evidence of national consensus.

The fact that no court has found a national consensus exists against the practice and no new legislation against it has been passed dooms the finding of a national consensus. This could change, though, if new legislation is passed. State legislatures should consider the above arguments about the reduced culpability of people with severe mental illness significantly impaired at the time of their crime to create a new prohibition of this kind. It would be a benefit to their own state and possibly the whole country because if a trend can be created, then a national consensus could be found against the practice nationwide.

VI. THE PARTIAL SUCCESS OF THIS APPROACH IN *KLEYPAS*

The 2016 Kansas Supreme Court case *State v. Kleypas*¹³⁹ illustrates how this approach may work with reliance on medical professionals' definition of "severe mental illness." In 2016, the Kansas Supreme Court considered a request made by death row defendant Gary Kleypas to create a categorical death penalty exemption for people who had severe mental illness at the time of their crime.¹⁴⁰ The court's decision on the issue was remarkable for its preliminary acceptance of Kleypas's proposed category of people to whom the exception would apply by reference to ABA Recommendation 122A.¹⁴¹ The court also found that Kleypas had standing to raise the issue because several experts had diagnosed him with schizophrenia and dissociative disorders, which would qualify as "severe" under the ABA Recommendation 122A criteria.¹⁴² However, the court denied Kleypas's proposal because they found that no national consensus existed against the executions and in the court's independent judgment a categorical prohibition was not necessary.¹⁴³ Although the *Kleypas* court only accepted the reliance on medical professional

¹³⁸ See, e.g., *Bryan v. Mullin*, 335 F.3d 1207, 1227–28 (10th Cir. 2003) (Henry, J., concurring in part and dissenting in part) (invoking *Atkins* to argue that the execution of a mentally ill defendant contributes nothing to the goals of retribution or deterrence and is unconstitutional); *Corcoran v. State*, 774 N.E.2d 495, 502 (Ind. 2002) (Rucker, J., dissenting) ("[T]he underlying rationale for prohibiting executions of the mentally retarded is just as compelling for prohibiting executions of the seriously mentally ill . . ."); *Joshua v. Adams*, 231 Fed. App'x 592, 599 (9th Cir. 2007) (Ferguson, J., dissenting) (arguing that the execution of a mentally ill defendant violates the Eighth Amendment because mental illness reduces culpability).

¹³⁹ *State v. Kleypas*, 382 P.3d. 373 (Kan. 2016).

¹⁴⁰ *Id.* at 443. Kleypas should have proposed a solution similar to the one outlined here.

¹⁴¹ See *id.* at 443–44 (citing ABA Recommendation 122A at length and concluding that "these standards set out a specific enough category to allow consideration of Kleypas' arguments.>").

¹⁴² *Id.* at 444.

¹⁴³ *Id.* at 444–48.

standards to define “severe mental illness” for the preliminary questions in the case, the decision marks a significant step on the issue and indicates how it may be successful in the future.

A. *Kleypas* Factual Background

Gary Kleypas’ factual and procedural situation represents a typical situation for defendants arguing for a new death penalty exemption based on severe mental illness. His crime was horrific, but there was substantial evidence that he was significantly impaired by severe mental illness at the time of his crime.

Kleypas was convicted for the 1996 murder, attempted rape, and aggravated burglary of a woman C.W.¹⁴⁴ The state offered evidence of several aggravating factors in seeking the death penalty.¹⁴⁵ These included Kleypas’s previous conviction for the 1977 murder of a Missouri woman and the heinous nature of his murder of C.W.¹⁴⁶ He forced himself inside her apartment, attempted to rape her, stabbed her repeatedly in the chest when she struggled, and stole her engagement ring and other things from her purse.¹⁴⁷ He then disposed of some of her things in a dumpster, returned to his apartment, and planned to leave town before his arrest.¹⁴⁸

In his defense, Kleypas offered evidence of several mitigating factors that focused primarily on his history of chronic mental illness and “severely deteriorated” mental state at the time of his crime.¹⁴⁹ He called many witnesses to support these claims.¹⁵⁰ Dr. Marilyn Hutchinson, a mitigation specialist and clinical and forensic psychologist, evaluated him between 2002 and 2004 and “described him as severely disturbed with a history of chronic maladjustment that caused behavioral control problems.”¹⁵¹ She also described his many diagnoses beginning in 1977 that showed “a history of dissociation, psychotic and paranoid thoughts, schizophrenic activity, alcohol and drug abuse, sexual

¹⁴⁴ *Id.* at 389–90.

¹⁴⁵ *Id.* at 390–91.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 390.

¹⁴⁸ *Id.* at 390–91.

¹⁴⁹ *Id.* at 391 (“In defense, Kleypas presented evidence of four mitigating circumstances: (1) Kleypas had a chronic mental illness and chronic maladjustment that had led to behavioral control problems throughout his life; (2) Kleypas’ mental status at the time of the crime was severely deteriorated; (3) when medicated, Kleypas’ mental status dramatically improved; and (4) Kleypas’ family had suffered a great deal and putting him to death would cause them additional suffering.”).

¹⁵⁰ Kleypas’ witnesses included “a mitigation specialist who was a clinical and forensic psychologist; a clinical child psychologist; a psychologist who had researched factors that cause a risk of violence; a physician who had performed two brain scans on Kleypas; Kleypas’ mother; and two individuals who had supervised Kleypas when he had been incarcerated in a Missouri prison.” *Id.*

¹⁵¹ *Id.*

perversion, and a significant personality disorder.”¹⁵² Dr. Hutchinson described Kleypas’ mental state at the time of the crime as “being negatively affected by major depression with psychosis and agitation; paraphilia including very disturbed sexual ideas; a personality disorder not otherwise specified; traits of narcissism, avoidance, and dependency; a schizotypal personality; and antisocial behavior.”¹⁵³ She based this opinion on observations by people who knew Kleypas around the time of the crime.¹⁵⁴ Witnesses described his disturbed behavior including screaming for no reason and having hallucinations in his jail cell, and Dr. Hutchinson assigned him an extremely low global assessment of functioning (GAF) score.¹⁵⁵ Evidence also suggested that Kleypas’ condition improved while he was on medication.¹⁵⁶ In rebuttal, the state offered the testimony of Dr. William Logan, a forensic psychiatrist, who testified that Kleypas was triggered primarily by sexual attraction and committed the crime in an organized way to avoid detection suggesting lack of delusion and disorientation.¹⁵⁷ The jury unanimously sentenced Kleypas to death, finding that the aggravating factors had been sufficient and were not outweighed by the mitigating factors.¹⁵⁸

B. Reliance on Medical Professional Organizations’ Definition of “Severe Mental Illness” in *Kleypas*

The *Kleypas* court’s analysis is unique among cases that have addressed the issue because the court found that the standards of ABA Recommendation 122A “set out a specific enough category to allow consideration of Kleypas’ arguments.”¹⁵⁹ Kleypas asked the court to create a categorical prohibition on executing people with severe mental illness at the time of their crime and apply it to him.¹⁶⁰ The state argued that the category of severe mental illness was incapable of definition.¹⁶¹ The court agreed with Kleypas that the category was capable of definition by relying on ABA Recommendation 122A and quoting its relevant language.¹⁶² The court further found that Kleypas had standing to raise the issue because several mental health professionals who examined him

¹⁵² *Id.*
¹⁵³ *Id.* at 391–92.
¹⁵⁴ *Id.* at 392.
¹⁵⁵ *Id.*
¹⁵⁶ *Id.*
¹⁵⁷ *Id.* at 392–93.
¹⁵⁸ *Id.* at 393.
¹⁵⁹ *Id.* at 444.
¹⁶⁰ *Id.* at 443.
¹⁶¹ *Id.*
¹⁶² *Id.* at 444.

diagnosed him with schizophrenia and dissociative disorders.¹⁶³ These diagnoses are explicitly listed as qualifying for the “severe” requirement in ABA Recommendation 122A.¹⁶⁴

The Kansas Supreme Court’s position on the category differs from other courts that have addressed the issue. Some other courts that have addressed the issue found that the category of mental illness that would count as “severe” could not be established.¹⁶⁵ By accepting the criteria of ABA Recommendation 122A for preliminary arguments, the Kansas Supreme Court demonstrated a potential resolution of category problems for a future prohibition on the execution of people with severe mental illness. Unfortunately, the Kansas Supreme Court did not adopt the prohibition proposed here and in ABA Recommendation 122A based on common objections.¹⁶⁶ These and others are addressed in the following section.

VII. OBJECTIONS

This section will address the major objections to a proposal for a new prohibition on the execution of people with severe mental illness who were significantly impaired by their illness at the time of their crime. This article has already proposed solutions to the objection that “severe mental illness” cannot be defined by relying on the standards of medical professionals.¹⁶⁷ It has also already proposed a solution to the individuation issue by proposing a requirement of “significant impairment.”¹⁶⁸ The following three objections have not already been addressed and should be considered thoroughly by any legislature or court in considering whether to create a new prohibition. All three can be answered satisfactorily.

A. The Reduced Culpability of People with Severe Mental Illness Can Be

¹⁶³ *Id.*

¹⁶⁴ ABA Recommendation 122A (2006).

¹⁶⁵ *See, e.g.,* *People v. Mendoza*, 62 Cal.4th 856, 911 (Cal. 2016) (finding that the “defendant does not offer a definition of what level of mental illness would constitute serious mental illness.”); *State v. Hancock*, 840 N.E.2d 1032, 1059 (Ohio 2006) (finding that the defendant did not sufficiently define “severe mental illness”).

¹⁶⁶ *See State v. Kleypas*, 382 P.3d. 373, 446–48 (Kan. 2016) (rejecting a categorical prohibition of the death penalty based on the classification of mental illness).

¹⁶⁷ *See supra* Part III(B).

¹⁶⁸ *See* ABA Recommendation 122A (2006) (explaining the proposed “significant impairment” requirement).

Sufficiently Accounted for in Sentencing

This objection argues that people with severe mental illness are already sufficiently protected in trial, sentencing, and execution procedures.¹⁶⁹ At trial, defendants deemed “incompetent” cannot be prosecuted.¹⁷⁰ Most states also have an “insanity defense” that exempts criminal defendants from full criminal punishment.¹⁷¹ The Supreme Court has further ruled that defendants who are “insane” at the time of execution cannot be executed.¹⁷² Mental illness can also be used as a mitigating factor in sentencing.¹⁷³ The objection, accepted by some courts including the Kansas Supreme Court in *Kleypas*, argues that these protections sufficiently account for the reduced culpability of people with severe mental illness. As the *Kleypas* court explains, “We have confidence that Kansas juries can weigh a defendant’s mental state at the time of the crime as a mitigating factor for consideration in the decision of whether to return a death penalty verdict.”¹⁷⁴ Unfortunately, however, the use of severe mental illness as a mitigating factor does not sufficiently account for reduced culpability as it did not for people with intellectual disability in *Atkins* and juveniles in *Roper*.

The Supreme Court in *Atkins* and *Roper* determined that use as a mitigating factor was not sufficient to account for the reduced culpability of people with intellectual disability and juveniles, and the same rationale applies to people with severe mental illness. The Supreme Court in *Atkins* found that mitigation was not sufficient protection for people with intellectual disability

¹⁶⁹ See, e.g., *Kleypas*, 382 P.3d at 447 (“We also note the protections already in place, which protect the incompetent from trial and the ‘insane’ from execution.”).

¹⁷⁰ See, e.g., *Jackson v. Indiana* 406 U.S. 715, 719 (1972) (noting that the trial court found the defendant incompetent to stand trial and “ordered him committed to the Indiana Department of Mental Health until such time as that Department should certify to the court that ‘the defendant is sane.’”).

¹⁷¹ See Natalie Jacewicz, *With No Insanity Defense, Seriously Ill People End Up In Prison*, NPR (Aug. 5, 2016, 10:06 AM), <https://www.npr.org/sections/health-shots/2016/08/05/487909967/with-no-insanity-defense-seriously-ill-people-end-up-in-prison> (listing Idaho, Kansas, Montana, and Utah as the four states without an insanity defense).

¹⁷² See *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (“The Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane.”).

¹⁷³ See *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)). (“In any capital case a defendant has wide latitude to raise as a mitigating factor ‘any aspect of [his or her] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.’”). See also *State v. Kleypas*, 382 P.3d. 373, 447 (Kan. 2016) (“Finally, as *Kleypas* did here, mental illness can be asserted as a mitigator. While we recognize a distinction between disqualification and mitigation, we also recognize that presenting mental illness as a mitigatory allows the jury to consider culpability.”).

¹⁷⁴ *Kleypas*, 382 P.3d. at 447.

because the condition inhibits fair consideration in sentencing.¹⁷⁵ The Court explained that the impairments of people with intellectual disability are relevant not only because they reduce culpability, but because these “impairments can jeopardize the reliability and fairness of capital proceedings against [them].”¹⁷⁶ The Court also noted that people with intellectual disability “may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.”¹⁷⁷ The same concerns are present for people with severe mental illness, who by the definition supplied by ABA Recommendation 122A often have “delusions (fixed, clearly false beliefs), hallucinations (clearly erroneous perceptions of reality), extremely disorganized thinking, or very significant disruption of consciousness, memory and perception of the environment.”¹⁷⁸ These impairments, if present, would inhibit a defendant’s ability to assist in their own case. The concern may be mitigated somewhat by medication, but medication creates its own series of problems due to difficult side effects which may make it more likely that a defendant has an unwarranted impression of lack of remorse for their crimes.¹⁷⁹

The *Roper* Court similarly found that the reduction in culpability of juveniles was not sufficiently protected by mitigation. The Court explained, “An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.”¹⁸⁰ The same rationale applies for people with severe mental illness. A capital case will always involve a heinous crime that often overpowers the mitigating factor of a defendant’s severe mental illness despite that defendant’s reduced culpability. The Supreme Court’s determinations in *Atkins* and *Roper* that mitigation was not sufficient protection for people with intellectual disability and juveniles thus makes any claim that it is sufficient protection for people with severe mental illness highly questionable.

¹⁷⁵ See *Atkins*, 536 U.S. at 321 (finding that “reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury.”).

¹⁷⁶ *Id.* at 306–07.

¹⁷⁷ *Id.* at 320–21.

¹⁷⁸ ABA Recommendation 122A, at 7.

¹⁷⁹ See, *What are possible side effects of antipsychotics?* NATIONAL INSTITUTE OF MENTAL HEALTH, https://www.nimh.nih.gov/health/topics/mental-health-medications/index.shtml#part_149866 (listing the possible uncomfortable and painful side effects of antipsychotic medication).

¹⁸⁰ *Roper v. Simmons*, 543 U.S. 551, 573 (2005).

B. Diagnoses Should Not Be Used for Legal Determinations

The second major objection to a categorical prohibition for people with severe mental illness argues that diagnoses should not be used for legal determinations. This position was taken on the issue by Dr. Douglas Mossman shortly following *Atkins*.¹⁸¹ Mossman points out that the American Psychiatric Association's diagnostic manual includes a "Cautionary Statement" that "The clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility."¹⁸² Mossman also cites the work of Professor Stephen Morse, who has "long believed that psychiatric diagnoses should play little or no role in legal proceedings."¹⁸³ Morse has argued that "the decision whether someone's capacity for rationality is sufficient to hold him responsible ultimately is 'a common sense inference,' so that 'the final judgment must be about the specific individual who is the potential subject of special mental health law treatment.'"¹⁸⁴ If the ultimate determination of reduced capacity for rationality, or culpability, should focus only on the specific individual, then a categorical determination based on diagnoses would not be proper. Though this is a strong objection, it can be answered in two ways.

First, the Supreme Court made the diagnosis of intellectual disability sufficient for a death penalty exemption under *Atkins*.¹⁸⁵ In recent cases interpreting *Atkins*, the Court has in fact relied more heavily on clinical definitions to determine which defendants qualify for an exemption under *Atkins*.¹⁸⁶ Relying on a diagnosis is thus permissible, and for *Atkins* cases required, under Supreme Court death penalty precedents creating a death penalty exemption.

Second, the proposed prohibition for people with severe mental illness outlined in this article does not make diagnosis sufficient for the exemption to

¹⁸¹ See Mossman, *supra* note 76, at 287–89 (casting doubt on the value of psychiatric diagnoses for legal proceedings).

¹⁸² *Id.* at 272 (arguing that the then-current edition of the Diagnostic and Statistical Manual of Mental Disorders [DSM-IV-TR] point to inherent limitations within the APA's diagnostic schemes).

¹⁸³ *Id.* at 287–88. See also Stephen J. Morse, *Crazy Reasons*, 10 J. CONTEMP. LEGAL ISSUES 189, 216 (1999) (arguing that diagnoses do not answer the legally relevant question of the reason for the defendant's behavior).

¹⁸⁴ Mossman, *supra* note 76, at 287 (citing Stephen J. Morse, *Crazy Reasons*, 10 J. CONTEMP. LEGAL ISSUES 189, 219 (1999)).

¹⁸⁵ See *Atkins*, 536 U.S. at 321 (concluding that "death is not a suitable punishment for a mentally retarded criminal" because it violates the Eighth Amendment prohibition of cruel and unusual punishment).

¹⁸⁶ See Part III(A), *supra* (explaining the increasing and continual reliance of the Supreme Court on clinical definitions for interpreting *Atkins*).

apply. ABA Recommendation 122A acknowledges that diagnosis alone should not be a basis for an exemption because of the heterogeneity of symptoms found in people with mental illness.¹⁸⁷ The Recommendation therefore proposes a requirement of a qualifying diagnosis and a determination that impairment from the disease be “significant.”¹⁸⁸ This was done to ensure that the defendant’s culpability was sufficiently lessened due to his or her condition, as for defendants with intellectual disability.¹⁸⁹ If implemented, this significant impairment requirement would allow individualized consideration of the defendant’s culpability and would not rely entirely on diagnoses.

C. Combating Stigma Should Require Treating People With Mental Illness As Fully Capable Agents

In creating a new death penalty prohibition, legislatures or courts should consider the impact it may have on stigma and discrimination against people with severe mental illness. Mental health professionals have worked for a long time to “reduce the discrimination and stigma associated with having a mental disorder.”¹⁹⁰ Creating a rule that recognizes the reduction of culpability for people with severe mental illness may imply that they are not fully capable agents.¹⁹¹ It might therefore increase stigma and discrimination, which is a heavy price to pay for an already stigmatized group. This concern, though highly important, can be answered in three ways.

First, the Supreme Court has not discussed combating stigma and discrimination in creating death penalty prohibitions. The *Atkins* Court did not mention the decision’s potential impact on stigma or discrimination for people with intellectual disability.¹⁹² Nor did the *Roper* Court address the issue for juveniles.¹⁹³ Concerns about stigma and discrimination have thus not been present in Supreme Court cases on death penalty exemptions and may not have to be considered for the creation of a new exemption. This may be implicit support by the Court for the idea that death penalty exemptions do not meaningfully increase stigma or discrimination.

Second, the proposal discussed in this article and supported by mental health professional organizations does not solely rely on category

¹⁸⁷ ABA Recommendation 122A at 7.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Mossman, *supra* note 76 at 272.

¹⁹¹ *See id.* at 273 (criticizing the *Atkins* decision because “it says explicitly that *all* persons diagnosed with mental retardation necessarily lack the capacity to accept full moral responsibility for their actions.”).

¹⁹² *See generally Atkins*, 536 U.S. 304.

¹⁹³ *See generally Roper v. Simmons*, 543 U.S. 551 (2005).

determinations but also includes a “significant impairment” requirement.¹⁹⁴ Implementation of the proposal would thus not imply that all people with severe mental illness are significantly impaired or anything less than fully capable agents. It would be a narrowly tailored exemption that ensures that a defendant meeting its conditions actually have impairments significant enough to reduce culpability.

Third, death is different. Imposition of the death penalty is so final and serious that it can only be imposed on “the worst of the worst.”¹⁹⁵ The proposal would still allow people with severe mental illness not found to be “insane” to be fully prosecuted and subject to harsh penalties including life imprisonment for serious crimes. Prohibition of the death penalty may thus only marginally impact stigma and discrimination.

VIII. CONCLUSION

People who had severe mental illness at the time of their crime and significant impairment due to their illness should not be eligible for the death penalty. Creating such a prohibition would prevent a significant number of executions.¹⁹⁶ It should be created because people with severe mental illness and significant impairment from their illness have sufficiently reduced culpability. A fruitful approach to creating such a prohibition is to rely on medical professionals to define the category of people with “severe mental illness.” This approach is supported by *Atkins* and recent Supreme Court cases interpreting *Atkins*. The success of this approach in the preliminary analysis of *Kleypas*, particularly the court’s reliance on ABA Recommendation 122A, demonstrates how it may be successful in the future. Objections to this approach can be addressed by the inclusion of a “significant impairment” requirement. A new prohibition on the execution of people with severe mental illness who were significantly impaired at the time of their crime should be created either judicially or legislatively.

¹⁹⁴ ABA Recommendation 122A, at 7.

¹⁹⁵ *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J. dissenting).

¹⁹⁶ See, e.g., *Mentally Ill Prisoners Who Were Executed*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/policy-issues/mental-illness/mentally-ill-prisoners-who-were-executed> (last visited Sept. 4, 2019) (listing recent executions of inmates who had mental illness).